No. 18452

United States Court of Appeals

For the Ninth Circuit

TURF CENTER, INC., ALLEN A. GOLDBERG, MILTON HYATT and MYER MAYOR FOX, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

REPLY BRIEF OF APPELLANTS

MURRAY B. GUTERSON
812 Hoge Building
Seattle 4, Washington

MAX R. NICOLAI
400 Alaska Building
Seattle 4, Washington
Attorneys for Appellants

THE ARGUS PRESS, SEATTLE

No. 18452

United States Court of Appeals

For the Ninth Circuit

TURF CENTER, INC., ALLEN A. GOLDBERG, MILTON HYATT and MYER MAYOR FOX, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

REPLY BRIEF OF APPELLANTS

MURRAY B. GUTERSON
812 Hoge Building
Seattle 4, Washington

MAX R. NICOLAI
400 Alaska Building
Seattle 4, Washington
Attorneys for Appellants

THE ARGUS PRESS, SEATTLE

TABLE OF CASES

STATUTES

RULES

ORDINANCE

CONSTITUTION

United States Court of Appeals
For the Ninth Circuit

TURF CENTER, INC., ALLEN A. GOLDBERG, MILTON HYATT and MYER MAYOR FOX, *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 18452

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

REPLY BRIEF OF APPELLANTS

This brief is written by appellants strictly in reply to appellee's brief. We will not repeat the arguments made in Appellants' Opening Brief unless we feel that further clarification is needed in the light of the Government's brief. We will take up the points to be made in the order in which they appear in the brief of the appellee.

In its counter-statement of the case the Government states (Brief of Appellee, pg. 5):

> " . . . The continuous nature of the business enterprise and the fact that the Western Union ticker had been used in the same fashion (Tr. 145-158)

[*Emphases whenever used were supplied by writer of this brief*]

> and the pull tabs sold in the same manner for many years is accepted by all parties. . . . ''

Appellants believe that this statement is misleading, because the appellants here only acquired the Turf Center, Inc. on May 15th and the indictments related to offenses alleged to have been committed on May 16th, May 17th, May 18th and May 22nd.

As a matter of fact, a grand jury was sitting on May 22nd, and the original indictment was filed on that date, while the indictments under consideration here were actually filed on July 12, 1962. In other words, insofar as these appellants are concerned the ''continuous nature'' of the business extends for a period of six days at best (see Tr. 473, l. 23, to 474, l. 1).

On page 8 of the Government's brief it is asserted that the Turf was operating with an average gross take of approximately $600,000.00 per year with a gross profit of $130,000.00 per year based on an average profit of 22 per cent on each board. Apparently the Government is citing these figures to give the impression that the appellants here are members of some gigantic crime syndicate.

In this connection, it should be pointed out that appellants merely sold the pull tabs without engaging in prohibited gambling activities. Further, to place the income figures mentioned by the Government in their true light, it is, of course, necessary to bring out that the actual net income from the pull-tab operation was around 3 per cent before *deducting the general overhead of the business applicable to this operation.* The record shows (Tr. 661, ll. 17-21):

> " . . . after you paid all the taxes and cost of the pool cards and the City taxes, why, the net, as a rough guess, *was around three per cent.* That was before some—generally before general overhead."

The Government contends that it experiences some difficulty in interpreting appellants' Specification of Error No. 3 (Brief of Appellants, pp. 35-51) alleging that the counts of the indictment under consideration were drawn in violation of Rule 7 (c), Federal Rules of Criminal Procedure. In order to clarify the precise issue, we state as follows:

Rule 7 (c) of Federal Rules of Criminal Procedure contains the following wording: "The indictment . . . shall be a plain, concise, and definite written statement of the *essential facts* constituting the offense charged . . . " It is appellants' contention that the excerpt from the rule quoted in effect seeks to assure to a defendant the protection guaranteed by the Sixth Amendment to the Constitution of the United States, which states "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; . . . " We are surprised to find that on this aspect of the case the appellee appears to rely on the decision in the case of *Russell v. United States,* 369 U.S. 749 (1962) (Brief of Appellee, pp. 36, 40). It should be noted that in the *Russell* case the United States Supreme Court reversed judgment of conviction of petitioners in six related cases. The petitioners were charged and convicted of violating 2 USC 192, which makes it a misdemeanor for a person summoned to testify before Congress to refuse to answer "any question pertinent to the question under inquiry. . . . " The indictment in these cases stated that

the questions involved were pertinent, but the indictments failed to identify the subject of the inquiry. We take the liberty to quote extensively from the decision in this case, because we are convinced that the *Russell* case may well be decisive of the issue before the court here. The Supreme Court decided as follows (at page 764):

> "As has been pointed out, the very core of criminality under 2 U.S.C. § 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer. What the subject actually was, therefore, is central to every prosecution under the statute. Where guilt depends so crucially upon such *a specific identification of fact,* our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.
>
> "'It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, — *it must descend to particulars.*"' *United States v. Cruikshank,* 92 U.S. 542, 558. An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.' *United States v. Simmons,* 96 U.S. 360, 362. 'In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, *without any uncertainty or ambiguity,* set forth all the elements necessary to constitute the offence

intended to be punished; . . . ' *United States v. Carll,* 105 U.S. 611, 612. 'Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances *as will inform the accused of the specific offence, coming under the general description,* with which he is charged.' *United States v. Hess,* 124 U.S. 483, 487. See also *Pettibone v. United States,* 148 U.S. 197, 202-204; *Blitz v. United States,* 153 U.S. 308, 315; *Keck v. United States,* 172 U.S. 434, 437; *Morissette v. United States,* 342 U.S. 246, 270, n. 30. Cf. *United States v. Petrillo,* 332 U.S. 1, 10-11. That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions.

"The vice which inheres in the failure of an indictment under 2 U.S.C. § 192 to identify the subject under inquiry is thus the violation of the basic principle 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, . . .' *United States v. Simmons, supra,* at 362. *A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined.* It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice in a quite different factual setting. *Cole v. Arkansas,* 333 U.S. 196, 201-202 . . ."

In the instant case we contend the indictment is fatally defective, because it fails to inform the appel-

lants of the specific offense of gambling in violation of the state law. The indictments merely charge the appellants with violation of RCW 9.47.010, 9.47.020, 9.47.030, 9.47.060 and 9.47.070. We append these statutes to this brief under Appendix A. Reading these statutes the court will note that they comprise almost any conceivable gambling offense which could be committed. Hence, it is clear that without specifying the manner in which a defendant is alleged to have committed a gambling offense under 18 U.S.C. § 1952, a defendant is forced to go to trial with the chief issue completely undefined.

This we are convinced is a violation of the Sixth Amendment of the federal constitution as well as of Rule 7 (c) of the Federal Rules of Criminal Procedure.

Appellee alleges (Brief of Appellee, pg. 44) that appellants cannot raise the issue, because they failed to request a Bill of Particulars. Appellants take the position that the defect existing is one so serious that a Bill of Particulars could not have cured it. Again we rely upon the decision of the Supreme Court in the *Russell* case, *supra* (page 770). The Supreme Court ruled:

> "But it is a settled rule that a bill of particulars cannot save an invalid indictment. See *United States v. Norris,* 281 U.S. 619, 622; *United States v. Lattimore,* 215 F.2d 847; *Babb v. United States,* 218 F.2d 538; *Steiner v. United States,* 229 F.2d 745; *United States v. Dierker,* 164 F.Supp. 304; 4 Anderson, Wharton's Criminal Law and Procedure, § 1870. When Congress provided that no one could be prosecuted under 2 U.S.C. § 192 except

upon an indictment, Congress made the basic decision that only a grand jury could determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry. *A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. . . .*"

The Supreme Court further decided, *Russell v. United States,* 369 U.S. 749 (at page 770):

"This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. *Ex parte Bain,* 121 U.S. 1; *United States v. Norris,* 281 U.S. 619; *Stirone v. United States,* 361 U.S. 212. 'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, *the great importance which the common law attaches to an indictment by a grand jury,* as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed. . . . Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, *at the mercy or control of the court or prosecuting attorney;* for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution

> places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.' *Ex parte Bain, supra,* at 10, 13. . . ."

Clearly, in the instant case, we do not know on what basis the grand jury indicted these defendants, and whether the evidence submitted to the grand jury was the same evidence that was submitted to the petty jury. If the indictment in each count, instead of specifying the RCW sections previously noted, had simply alleged violation of RCW Title 9.47, the defendants here could not have been worse off insofar as their predicament of uncertainty is concerned.

In order to accord to the appellants the protection of an indictment by a grand jury we deem it indispensable that the precise nature of the gambling offense should have been set forth in detail in each count of the indictment.

Appellants' position is further fortified by appellee's argument in support of the court's instruction to the effect that the playing of pull tabs on boards constitutes gambling. Appellee (Brief of Appellee, pg. 62) relies on the following cases: *State v. Greene,* 158 Wash. 574, 291 Pac. 728; *State v. Danz,* 140 Wash. 546, 250 Pac. 37; *State ex rel. Evans v. Brotherhood, etc.,* 41 Wn.2d 133, 247 P.2d 787; *State v. Cross,* 22 Wn.2d 402, 156 P.2d 416; *State v. Kaukos,* 109 Wash. 20, 186 Pac. 269.

The *Green* case, *supra,* involves a conviction of bookmaking on a football game. The *Danz* case, *supra,* involved a conviction of operating a lottery by giving prizes to purchasers of theater tickets. The statute involved in that case is now codified as RCW 9.59.010.

The *Evans* case, *supra,* decided that a slot machine is a mechanical lottery. The violation relates to what is now codified as RCW 9.47.040 and 9.47.050. Both of these statutes are not involved here. The *Cross* case, *supra,* relates to a conviction of bookmaking on a horse in violation of what is now codified as RCW 9.47.060, and the *Kaukos* case, *supra,* relates to violation of what is now codified as RCW 9.47.010—playing of stud poker. A reading of the cases relied on by appellee clearly shows that the gambling offenses charged by the indictment here generally can be committed in innumerable ways. Hence, if the indictments are permitted to stand the defendants are not merely exposed to the uncertainty of the charge, but also could not rely on the defense of double jeopardy, in the event of a subsequent indictment.

We also deem in point the decision of the United States District Court, Northern Division, Eastern District of Illinois, in *United States of America v. Patterson,* 155 F.Supp. 669. In that case the defendants were indicted under a statute rendering it a criminal offense to send through the mails into a state, whose laws contained specified prohibitions, any set of artificial teeth constructed from a cast made by a person not licensed to practice dentistry pursuant to the laws of the receiving state. The learned District Judge ruled as follows (at page 676):

> ". . . The fact that the indictment, in some cases, *does not cite the precise section* which defines *the practice of dentistry,* does not of itself render the indictment bad so long as there is an adequate reference to the statute which contains both the pro-

hibition and the definition, *and so long as the specific facts or conduct relied upon as falling within the prohibition* are specified. . . ."

The District Judge decided (at page 678):

"It is clear that Counts IV, V, VII, and VIII would be senseless and lacking in essential allegations unless the references to the laws of Illinois and Michigan are considered. I have considered those references and find that the references contained in the indictment *are themselves senseless, inadequate and misleading.* I believe that in order honestly to apprise the defendants of the essential facts constituting the offense charged, the indictment should, *in a case such as this, set out the State laws relied on in haec verba.* Counts IV, V, VII, and VIII, of the indictment do not contain a plain, concise and definite statement of the essential facts constituting the offense charged and, therefore, on the court's own motion should be dismissed."

On pages 48 and 49 of appellee's brief appellants are being criticized for referring to Seattle Ordinance No. 79335 and actions of the Mayor taken on January 1, 1963. The Seattle ordinances are codified by Book Publishing Company, Seattle, Washington, and Chapter 10.85.010 to 10.85.130 of the code refers to licensing involved in the devices pertinent to this case. In addition, the matter objected to by appellee was specifically mentioned by the trial judge (Tr. 895, ll. 24 to 896, l. 7):

"It is true, apparently, that the City over a period of time has not sought to enforce the provisions of the State law, and, perhaps, their ordinances have been drafted so as to be in some respects at variance with the State law. I am not concerned with that. But, the fact is apparent that

> you new owners were carrying on the operation of your predecessor and you were doing so without interference from the State or from the City Police or law enforcement agencies. . . ."

Needless to say, the existence of the licensing provisions of the code and the actual attitude of law enforcement in the City of Seattle has an important bearing upon the presence or absence of appellants' good faith in operating the pull-tab business.

Appellee claims that appellants' Specification of Error No. 7 is confusing as to the basis upon which appellants take issue with the court's instructions. Nothing could be further from the truth. Throughout the trial appellants' trial counsel took the position that the words "in violation of the laws of the State" contained in paragraph (b) of 18 U.S.C. § 1952 refer only to prostitution offenses and not to business enterprises involving gambling. In other words, rightly or wrongly, appellants' trial counsel took the position that gambling as mentioned in Section 1952 of Title 18 U.S.C. had to be defined as that term is generally understood in criminal law rather than under a specific statute of the State of Washington. Mr. Guterson made this plain in taking his exceptions (Tr. 856, ll. 9-20):

> "Number one is in connection with the Court's charge relative to the necessary elements pertaining to 18 United States Code, Section 1952, and I make further reference to the fact that the Court in its explanation of the essentials made reference to gambling as defined by the State of Washington.
>
> "This is in keeping with the motion I made before and renewed during the course of the trial,

> that we feel the statute is so broad and subject to so many various interpretations that [it is impossible to conclude that] the *rational interpretation is that the Congress had in mind gambling violations of the particular State.*"

In fact, the instant case presents one more illustration of the increasing practice of the Federal Government actively prosecuting for state law violations — gambling offenses in the instant case. This practice was condemned recently by the United States Court of Appeals for the Ninth Circuit in the case of *Twitchell v. United States,* 313 F.2d 425 (1963) where the court stated (at page 428):

> "Neither prostitution nor maintaining or conspiring to maintain a house of prostitution is a federal offense. *It is not the business of federal prosecutors to prosecute for state offenses, or of federal courts to entertain such prosecutions.* And we think that federal courts must be on guard against attempts to convert what are essentially offenses against state laws into federal crimes via the conspiracy route. (See the opinion of Harlan, J., concurring in part and dissenting in part, in *Ingram v. United States,* 1959, 360 U.S. 672, 683, 79 S.Ct. 1314, 3 L.Ed.2d 1503; cf. Jackson, J., concurring, in *Krulewitch v. United States,* 1949, 336 U.S. 440, 455-458, 69 S.Ct. 716, 93 L.Ed. 790.) That appears to us to be what happened here."

Finally, we reiterate our position to the effect that the trial court committed reversible error in failing to give appellants' requested instruction pertaining to good faith (see Tr. 857).

Though appellee contends that the trial court's in-

structions on the issue of criminal intent were proper (Brief of Appellee, pp. 64-67) we are convinced that appellee fails to meet the true issue.

In the first place, Section 1952 of Title 18 U.S.C. requires a *specific intent* to carry on an unlawful activity —gambling here. It is undisputed that when appellants acquired the Turf on May 15, 1962, they continued to carry on the pull-tab business during the next seven days (the period covered in the indictment) in the same manner as this business had been carried on for the past twenty years by the former owners. The trial court, counsel on both sides and the citizens of Seattle were well aware that there had been in effect in Seattle a tolerance policy concerning certain types of "gambling activities" including the pull-tab business. In addition, it cannot be denied that the scope of the Federal statute was uncertain. As the learned trial judge pointed out (Tr. 897, ll. 18-21) at time of sentencing:

> ". . . It is true, even today, there is uncertainty as to the scope of the Federal statutes. It is not certain just what activities or operations may come *within the scope of these and other statutes. . . .*"

(Tr. 898, ll. 17-23):

> ". . . The statute is broad. It may be upset. I don't know. But it is so broad that anyone engaging in any type of gambling had better look pretty carefully to determine whether their operation in some way is or has been supplemented, encouraged or facilitated through an instrument in or otherwise involved in interstate commerce."

In addition it should be emphasized that the trial court instructed, *inter alia,* as follows (Tr. 844, ll. 5-13):

> "It is reasonable to infer that a person ordinarily intends *the natural and probable consequences of acts knowingly done or knowingly omitted.* So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all the consequences which one standing in like circumstances and possessing like knowledge *should reasonably have expected to result from any act knowingly done or knowingly omitted by them.*"

(Tr. 844, l. 19 to 845, l. 3):

> "It is not necessary for the prosecution to prove *knowledge of the accused that a particular act or failure to act was a violation of law.* Unless and until outweighed by evidence to the contrary, *the pesumption is that every person knows what the law forbids, and what the law requires to be done.* However, evidence that the accused or any of these defendants acted or failed to act because of *ignorance of the law, is to be considered in determining whether or not the accused acted or failed to act with specific intent as charged.*"

It is our position as pointed out in our opening brief that the evidence is insufficient to submit the guilt of appellants to the jury. Having done so and having given the foregoing instructions, the language contained in appellants' requested instructions, "Any action taken in good faith or upon an honest though mistaken error in judgment is not criminal," takes on additional importance. In fact, the trial judge, by failing to give appellants' request, denied appellants the only defense available to them insofar as the jury was concerned.

It is respectfully submitted that the indictment be

dismissed or in the alternative that a new trial be ordered.

Respectfully submitted,

MURRAY B. GUTERSON
MAX R. NICOLAI
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....

MAX R. NICOLAI
Attorney

APPENDIX A

Applicable Statutes — Revised Code of Washington

RCW 9.47.010 Conducting gambling. Every person who shall open, conduct, carry on or operate, whether as owner, manager, agent, dealer, clerk, or employee, and whether for hire or not, any gambling game or game of chance, played with cards, dice, or any other device, or any scheme or device whereby any money or property or any representative of either, may be bet, wagered or hazarded upon any chance, or any uncertain or contingent event, shall be a common gambler, and shall be punished by imprisonment in the state penitentiary for not more than five years. [1909 c 249 § 217; Code 1881 § 1253; 1873 p 206 §§ 110, 111; 1869 p 222 §§ 104, 105; 1854 p 93 § 99; RRS § 2469.]

RCW 9.47.020 Gambling. Every person who shall bet, wager or hazard any money or property, or any representative of either, upon any game, scheme or device, opened, conducted, carried on or operated in violation of RCW 9.47.010 shall be guilty of a misdemeanor. [1909 c 249 § 218; RRS § 2470.]

RCW 9.47.030 Possession of gambling devices. Every person who shall have in his possession or shall permit to be placed or kept in any building or boat, or part thereof, owned, leased or occupied by him, any table, slot machine, or any other article, device or apparatus of a kind commonly used for gambling, or operated for the losing or winning of any money or property, or any representative of either, upon any chance or uncertain or contingent event, shall be guilty of a gross misdemeanor. [1909 c 249 § 220; RRS § 2472.]

RCW 9.47.060 Pool selling and bookmaking. Every person, whether acting in his own behalf, or as an agent, servant or employee of another person within or outside of this state, who shall sell any pool, make any book, or receive, record, register, transmit or forward any bet or wager, or any money or property or thing of value designed or intended to be bet, wagered or hazarded, upon the result of any contest or trial of skill, speed or endurance between men or beasts, whether such contest or trial take place within or outside of this state, or upon the result of any lot, chance, casualty, or uncertain or contingent event whatever, shall be punished by imprisonment in the state penitentiary for not more than five years. [1909 c 249 § 221; RRS § 2473.]

RCW 9.47.070 Allowing building to be used. Every person being in possession or control of any tent, building, float or vessel, or part thereof, who shall knowingly permit the same, or any part thereof, to be used for gambling, swindling, pool selling, or bookmaking, or for betting, wagering or hazarding money or property, or any representative of either, upon any game, scheme or device, or upon the result of any lot, chance or uncertain or contingent event whatever, shall be guilty of a gross misdemeanor. [1909 c 249 § 222; Code 1881 §§ 1257-1258; 1879 p 98 §§ 5-6; 1873 p 206 § 111; 1869 p 222 § 105; 1854 p 93 § 100; RRS § 2474.]